2009

# State of Utah v. Jonathan Aalexander Meza : Reply Brief

Utah Court of Appeals

# IN THE UTAH COURT OF APPEALS

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| STATE OF UTAH,<br><br>Plaintiff / Appellee,<br><br>vs.<br><br>JONATHAN ALEXANDER MEZA,<br><br>Defendant / Appellant. | Case No: 20090684-CA |

## REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, FROM THE JUDGMENT, SENTENCE AND COMMITMENT ON ONE COUNT OF AGGRAVATED ROBBERY BEFORE THE HONORABLE JUDGE GARY D. STOTT AND JUDGE DAVID N. MOTENSEN

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Statutory Provisions



Cases

**IN THE UTAH COURT OF APPEALS**

| | |
|---|---|
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## ARGUMENT

Meza here replies to the State's two arguments. First, Meza's Motion for Directed Verdict sufficiently preserved the issue now argued on appeal because his motion gave the trial court the opportunity to review the elements of the crime and consider whether evidence had been admitted to support a conviction. Further, if Meza's motion did not give the court the opportunity to correct the error, then the plain error standard should apply and all trial courts should be aware, based on settled law, that when there is insufficient evidence to support a guilty verdict the charge should not be sent to the jury.

Second, the evidence presented at trial was insufficient to support a conviction upon the charge of Aggravated Robbery and the trial court should not have permitted the jury to consider the charge, or at very least, following the verdict, should have reduced the conviction from Aggravated Burglary to Burglary.

## I. MEZA'S MOTION FOR DIRECTED VERDICT PRESERVED THE MATTER OF INSUFFICIENCY FOR THIS APPEAL AND IF NOT THEN THIS COURT SHOULD REVIEW BOTH ISSUES AS PLAIN ERRORS

### A. The motion for directed verdict, by its nature and in context, brought the matter of insufficient evidence to the attention of the trial court.

Following the close of the evidence Meza made a motion for directed verdict stating that "[t]he State did not present sufficient evidence for the matter to go to the jury, that in the light most favorable to the State, the state (sic) presented insufficient evidence to tie Jonathan Meza to the crime." R. 185: 452-53. In response the court said "I anticipated the motion. It is my decision with respect to that motion that there are – that questions had been raised, significant questions of fact had been raised that the trier of fact, that is the jury must make a determination as to the guilt or innocence of the defendant and therefore I believe under the case law in the state of Utah, those material facts new need to go forward to the ultimate decision by the jury and the motion is respectfully denied." R. 185: 453.

The State has argued that this motion "obviously referr[ed] to the State's evidence identifying him as the masked robber" and therefore was an objection based on one ground and is insufficient to preserve an alternative ground on appeal. Appellee's Brief at 10-11. The State claims the motion "could not have sufficiently brought the error now claimed on appeal 'to the trial court's attention to give the court an opportunity to correct the error[] if appropriate.'" Appellee's Brief at 11 (*citing State v. Low*, 2008 UT 58, ¶ 17. According to *State v. Holgate*, 2000 UT 74, ¶ 14, 10 P.3d 346, "[a]s a general rule, to ensure that the trial court addresses the sufficiency of the evidence, a defendant must

request that the court do so." "[W]hen a defendant moves the court to arrest judgment on the basis of insufficient evidence, the directive is mandatory in that the court 'shall[] arrest judgment if the facts proved or admitted do not constitute a public offense." *Id.*, (*citing* UTAH R. CRIM. P. 23).

The State cites several cases in support of its claim that a specific objection must be at trial in order to preserve an issue for appeal. First, in *State v. Low*, 2008 UT 58, ¶ 1, 192 P.3d 867, the defendant appealed his conviction for manslaughter as a lesser included offense to the charged crime of murder. On appeal he claimed the trial court improperly instructed the jury on extreme emotional distress manslaughter and imperfect self-defense manslaughter over his objection because they are not lesser included offenses but affirmative defenses to be claimed by the defendant. *Low*, 2008 UT 58, ¶ 14. The State challenged his appeal by claiming that the issue was not preserved because at trial his objection to the imperfect self-defense instruction was that he was concerned "the jury would confuse it with his claim of perfect self-defense..." *Low*, ¶ 15. The Utah Supreme Court agreed with the State and found that because the defendant's objections to the jury instructions at trial were different than the his claimed objections on appeal, the appellate issues were not preserved. *Id.* at ¶ 18.

The Sate also cites *State v. Winfield*, 2006 UT 4, 128 P.3d 1171. Defendant was convicted of aggravated burglary and appealed the sufficiency of the evidence. The defendant proceeded pro se at trial and did not make a specific objection to the sufficiency of the evidence. On appeal he claimed that the sufficiency claim was preserved by the filing of a pretrial motion to quash the bindover and by "discussion with

the trial court following the delivery of the court's written order denying his motion to quash." *Winfield*, 2006 UT 4, ¶ 24. The Utah Supreme Court denied the defendant's claim that the sufficiency issue was preserved by the motion to quash because there is a "disparity between the standards of proof for a pretrial motion to quash a bindover based on insufficient evidence and an objection to the sufficiency of the evidence following a trial." *Winfield*, ¶ 25. Because any "flaw in a bindover determination is necessarily cured if the defendant is later convicted beyond a reasonable doubt" a party is required to renew any sufficiency objection at trial to inform the court of his claim that the evidence presented at trial is insufficient to support a conviction. *Id.* at ¶ 26.

In *Winfield* the defendant's second claim, that his sufficiency issue was preserved by a conversation with the court regarding the written order for bindover was also denied because it lacked the "requisite specificity." *Id.* at ¶ 27. The Court found his references to insufficiency to be "so cryptic and vague that they did not satisfy the specificity requirement." *Id.* A footnote clarifies that the conversation relied upon did not contain any objection to the sufficiency of the evidence. *Id.* at fn 8.

The State repeatedly cites *State v. Gill*, 2007 UT App 227U, *1, as an example of a case where the specific objection rule is required to preserve a claim of insufficient evidence on appeal. Appellee's Brief at 10. In *Gill* the defendant argued there was insufficient evidence to support his convictions and that the trial court should have entered a "directed verdict of acquittal sua sponte." This Court applied the preservation rule to the defendant's claims and because he had not made a motion for directed verdict his claims were reviewed under a plain error standard. *Id.* Because the unpublished

opinion in *Gill* merely mentions that the defendant failed to object to insufficient evidence at trial as the reason for the plain error review the case is not particularly helpful in considering whether Meza's motion for directed verdict preserved an objection to the insufficiency of evidence to prove the conviction or merely one element of that charge.

However, the application of the preservation rule to the defendant in *Gill* does not require, as the State asserts, that Meza, who did make a motion for directed verdict and claimed that the State had failed to produce sufficient evidence for the charge to go to the jury, that Meza's motion cite specifically which specific basis, in other words which element, Meza believed the State had failed upon. *Gill* merely stands for the proposition that where a defendant fails entirely to raise the issue of sufficiency at trial he must then prove plain error.

Finally, the State cites *State v. Holgate*, 2000 UT 74, ¶ 1, 10 P.3d 346, where the defendant was convicted of murder and aggravated burglary and appealed his convictions on the basis of insufficient evidence. There the defendant failed to raise the sufficiency argument at trial but claimed that he should be entitled to raise the claim on appeal because "a conviction based on insufficient evidence constitutes 'plain error' or 'exceptional circumstances'..." *Holgate*, 2000 UT 74, ¶ 10. The Court found that where a defendant fails to move for a relief based on sufficiency the trial court need only address it if the defect is apparent, otherwise the defendant make a proper objection or motion. *Id.* at 15.

Unlike the defendants in *Winfield*, *Holgate* and *Gill*, Meza made a clear and timely motion for directed verdict at the close of the evidence based on insufficient evidence.

He brought the essence of the matter now argued on appeal before the trial court. He alleged that the State had failed to produce sufficient evidence that he had committed the crime alleged. The State suggests that the motion did not bring the matter of sufficiency to the trial court's attention but that it was obviously and solely made on the issue of the robber's identity. Meza cannot find support in the record for this assertion other than the word "tie" upon which he believes the State has placed entirely too much emphasis.

This was a trial upon one count, and that single count, according to the jury instruction, had 9 elements. R. 154. If the State's argument is correct, when Meza moved for a directed verdict because "the State presented insufficient evidence to tie [him] to the crime" the motion only allowed the court to review the evidence offered in support of element 1, the identity of the robber. However, it is clear from the court's response, that its attention was drawn to the rest of the elements and that it in fact considered the rest of the elements. The court responded that multiple "questions had been raised" and that the jury needed to make determination. R. 185: 453. The court thought, with respect to the motion for directed verdict, that the jury had material facts to consider on at least several questions.

If this were a case were there were multiple or dozens of counts with multiple factual elements to each count, the State's concern that the trial court's attention would not be raised on one individual sufficiency challenge may be more persuasive. But where, as here, there is only one count, the motion for directed verdict raised specifically upon insufficient evidence clearly gave the trial court notice to consider whether or not

the last element, the element that aggravates and elevates the robbery from a second to first degree felony, had been proved by sufficient evidence.

The two purposes of the preservation rule, (1) to give the trial court the opportunity to address the claimed error and (2) to prevent the defendant from strategically enhancing the chances of acquittal by not objecting until appeal, are not offending in this case. First, as argued above, Meza's motion for directed verdict obviously raised the issue before the trial court because there was very little to consider, only one count, and the court's response signaled that it considered there to be "questions" that the jury should decide. Second, there could be no advantage to Meza by purposefully omitting a sufficiency challenge in order to take his chance with the jury and then raise it on appeal. From Meza's perspective he would want as many chances as possible for this case to be dismissed. It was in his interest at the time of the trial for the court to review whether or not the State had produced evidence that he used or threatened to use a dangerous weapon and there was no strategic value in waiting for this Court to examine it.

This matter is simple. Meza made a motion for directed verdict upon one count explicitly claiming that the State failed to produce enough evidence to prove he committed the crime. That objection raised the issue he now argues on appeal to the attention of the trial court. The court had the change to address the claimed deficiency and it briefly did so. Therefore, this Court now has the proper record to review the claimed error and the obligation to examine whether or not there is sufficient evidence to uphold a conviction for aggravated robbery.

**B. In the alternative, the Court's failure to dismiss the charge or reduce it to simple robbery should be reviewed for plain error.**

If this Court finds Meza's motion did not preserve the matter of insufficiency for appeal then that issue, both before and after the jury's verdict, should be reviewed under the plain error standard. Under a plain error review "a defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." *State v. Holgate*, 200 UT 74, ¶ 17. In this case "the trial court plainly errs if it submits the case to the jury and thus fails to discharge a defendant when the insufficiency of the evidence is apparent to the court." *Id.* Finally, an appellate court can find the insufficiency was apparent to the trial court where "the State presents *no* evidence to support an essential element of a criminal charge." *Id.*

"In order to submit a question to the jury, it is necessary that the prosecution present some evidence of every element needed to make out a cause of action." *State v. Noren*, 704 P.2d 568, 570 (Utah 1985). Unless and until the State produces evidence of each element of the charged offense it has not met its burden and the court must hold the State to that burden. If the State fails to produce enough evidence then the court cannot allow the case to go to the jury.

**II. THE EVIDENCE PRESENTED AT TRIAL DID NOT SUPPORT A GUILTY VERDICT FOR AGGRAVATED ROBBERY. THE TRIAL COURT SHOULD NOT HAVE DELIVERED THE CHARGE TO THE JURY, OR IN THE ALTERNATIVE SHOULD HAVE REDUCED THE CONVICTION TO SIMPLE ROBBERY FOLLOWING THE JURY'S VERDICT.**

The State claims that "*Reyos* and *Ireland* are dispositive of this case" because the robber in this case used the word "stickup." Appellee's Brief at 17. "That announcement, like the robber's in *Reyos*, clearly signaled that Defendant was in control of a gun, an indisputably dangerous weapon." Appellee's Brief at 17 (*citing Ireland*, 2005 UT App 209, ¶ 12). But the State ignores the incredible distinctions between the facts in this case and in those two allegedly dispositive cases, the distinctions clearly laid out in the Appellant's Brief, and relies entirely upon the word 'stickup' being synonymous with the use of a firearm. However, simply uttering the word stickup does not communicate the possession of or intent to use a gun, certainly not like using the words "get the gun and shoot." *Reyos*, 2004 UT App 151, ¶ 3. Even in the face of the extensive list of cases with which the term stickup referred to offenses accomplished with the aid of a firearm, the State produces no argument upon which

Further, having a hand at ones pocket below the counter throughout the robbery and gesturing to it does not constitute representing that one has a gun in order to influence a victim, at least not to the extent that pointing through the inside of ones coat pocket at the victim as if to point a gun would. *Ireland*, 2005 UT App 209, ¶ 2.

Despite the State's suggestion that the facts in *Reyos* and *Ireland* are so similar, it is indisputable that the conduct which was determined in those cases to reasonably lead the victims to believe a weapon would be used was much more serious and obviously

threatening than the conduct in this case. In *Reyos* the defendant shouted "Get the gun and shoot" at a crowd that had assembled as he tried to escape from a robbery. *Reyos*, 2004 UT App 151, ¶ 3. In *Ireland* the defendant "gestured like he had a gun" by pointing the representation of a gun at the victim through his coat pocket. *Ireland*, 2005 UT App 209, ¶ 2. To show why the difference between the facts is so important, Meza asks the Court to consider the language of the statutes at issue, §76-6-302 and § 76-1-601.

The aggravated robbery statute, § 76-6-302 is not focused solely upon the victim's fear or belief in the threat of a use of a weapon that likely to cause death or serious bodily injury. It is not enough for the victim to fear that there *may* be a weapon and that it *may* be used. It is not enough that the victims here felt threatened that the robber may have had a gun. Any robbery victim may be afraid that the robber is armed. The statute requires actual conduct on the part of the robber that objectively represents a threat that a weapon will be used to cause death or serious bodily injury. The statute requires that the robber "uses or threatens to use a dangerous weapon" in the course of the robbery, and where there is no evidence that a dangerous weapon was actually used, as in this case, in addition to evidence of a facsimile or representation of a weapon there must also be evidence of a threat to use the pretend or represented weapon. UTAH CODE ANN. § 76-6-302. This is where the facts of this case differ from the facts in *Reyos* and *Ireland.*

This distinction, the lack of a threatened use, is what is key in this case and what separates this case from the facts in *Reyos* and *Ireland.* While the Prices expressed concern and fear that the robber may have had a weapon, nothing in their descriptions of the robber's appearance or conduct lead them to reasonably believe that he actually did

have a dangerous weapon, but more importantly, nothing about the robber's conduct constituted a threat to use the weapon that the Prices believed he may have had.

Unlike the victims in *Reyos*, where they were explicitly told that a gun would be produced and that they would be shot, the robber in this case never made any mention of a firearm or a threatened use thereof. The victims here never heard the robber say he had a weapon or that if they refused to comply that it would be used. The robber did not imply that he had a gun even hint at it. The only thing he said was "this is a stickup" and, despite the State's assertion that the word stickup is synonymous with robberies where a weapon is used, in this case the word alone, or combined with holding his had below the counter at his pocket, did not constitute a threat to use a dangerous weapon. The word stickup here only communicated that the robber wanted them to give him the money, not that he had a gun and would use it. It is not enough for the conduct to satisfy § 76-1-601, the definition of dangerous weapon. The State had not met its burden by showing that the robber's conduct satisfied the definition of dangerous weapon. The State must also then meet the requirements of § 76-6-302 by proving that the robber threatened to use the representation or facsimile, as the defendant's verbal threats did in *Reyos*. Telling the victims that they had a gun and it would be shot was a threat to use a dangerous weapon.

Unlike the victims in *Ireland*, where they saw an object within the robber's jacket pointed as if it were a gun, the robber in this case never made an objectively threatening gesture that suggested he had a weapon. The victims here never saw the robber point anything at them, nor did his conduct in anyway objectively demonstrate that he was trying to communicate that he had a weapon. The only evidence presented at trial, which

was suspicious at best because it was never mentioned before trial and the video tends to disprove it, was Mrs. Price's testimony that she observed a bulge in the robber's pocket. Despite the State's assertion that the robber's motioning "led [the Price's] to fear that Defendant has a gun and to fear for their lives" there is insufficient evidence to support the element that the robber used or threatened to use a dangerous weapon. The fact that the were afraid he had a gun and were afraid for their lives does not prove that he in fact had a gun, or threatened he had a gun, or most importantly that he threatened to use a gun as is required by the statute. It is not enough for the State to produce evidence sufficient to prove that the bulge in the robber's pocket represented a gun arguably satisfying § 76-1-601. The State needed to produce evidence sufficient to prove that the robber threatened to use the representation in the course of the robber, as the defendant's pointing of the representation at the victims did in *Ireland*. Pointing at the victim, as if with a gun, inside his coat pocket was the defendant's in *Ireland* objective threat to use a dangerous weapon. Here, regardless of what the victims feared, because there was no conduct objectively threatening to use a dangerous the aggravated robbery conviction cannot stand and the trial court should not have allowed the jury to convict Meza upon a crime for which insufficient evidence had been produced.

The State is correct, when the robber entered the store he wore a mask, "a costume likely to cause fear on sight." Appellee's Brief at 17. He announced it was a stickup and demanded the money in the till. However, the State is incorrect that these declarations were the equivalent of a statement that he was in possession of a gun, or a threat that a gun would be used. He did not mention he had a weapon or even hint at it. Saying it was

a stickup, despite the association the word may have with the a robbery accompanied by a weapon, did not constitute a declaration that he was armed. It did not constitute an objective threat to use a weapon. Calling it a stickup was no different than if he had entered and said 'This is a robbery.' Because the his announcement was not accompanied by another conduct which demonstrated that he had a weapon and did or would use it, his conduct was not aggravated robbery. He did not threaten that if the victims did not comply that a weapon would be used or that he would harm them. He only told them it was a stickup, meaning a robbery, meaning he was there to take the money.

The State's anecdotal string cite of Utah cases which use the words stickup or holdup is not helpful in this case because none of the examples mentioned describe an incident similar to the facts in this case. See Appellee's Brief at fn 6. While the case do suggest that the terms stickup and holdup are used when the perpetrator uses a gun, none of the cases cited show an incident where a robber accomplishes a robbery without the use of a weapon and yet the incident is found to be a stickup or aggravated robbery, as is the case here. In fact this list seems to support Meza's claim that, despite the robber's use of the word stickup, what took place in this case was not a stickup but in fact merely a robbery because there he did not use a weapon. Rather than suggest that use of the word stickup in this case communicated to the victims that the robber was in control of a dangerous weapon and would likely use it to cause serious injury, the list more accurately describes the situations where aggravated robbery is appropriate and distinguishes those situations from the instant case where the conduct was much less threatening and

dangerous just as the distinction created by the legislatures intended.[1] As demonstrated

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[1] *State v. Galli*, 967 P.2d 930, 932 (Utah 1998) (in one incident the defendant pointed a gun at a clerk, in another he robbed a theater with a handguns, and finally he pointed a gun at a clerk and said "This is a stickup, give me all of your money or I'll kill you."); *State v. Stilling*, 856 P.2d 666, 675 (Utah App. 1993) (in one incent described by the defendant as a holdup he held a gun to a bookkeeper and ordered her to open a safe); *State v. Reedy*, 681 P.2d 1251, 1251, 1254 (Utah 1984) (in an incident described by the Court as a holdup the defendant's thrust a revolver at a service station attendant and demanded all the money); *State v. Wulffenstein*, 657 P.2d 289, 290-292 (Utah 1982) (in an incident referred to by the Court as a holdup the defendant and another entered a pharmacy, pulled a gun and demanded narcotics and drugs and threatened to kill the employees); *State v. Cummins*, 27 Utah 2d 365, 496 P.2d 709, 709-10 (Utah 1972) (in several incidents described by the Court as holdups the defendant accosted two separate service station attendants with a gun demanding the money from the till); *State v. Jordan*, 26 Utah 2d 240, 487 P.2d 1281, 1284 (Utah 1971) (victim of a robbery was shot and killed, defendant pulled a gun and told the victim it was a stickup); *State v. George*, 8 Utah 2d 172, 330 P.2d 493, 493 (Utah 1958) (defendant pointed a gun at the clerk and handed him a note that said "This is a holdup..."); *State v. Neal*, 123 Utah 93, 254 P.2d 1053, 1055 (Utah 1953) (the reference to the term holdup in the opinion does not mention the use of a weapon); *State v. Seyboldt*, 65 Utah 204, 236 P. 225, 233 (Utah 1925) (an incident described in defendant's confession as a stick up involved shooting and killing a victim policeman); *Westerdahl v. State Ins. Fund*, 60 Utah 325, 208 P. 494, 494-495 (Utah 1922) (during an incident described as a holdup victim customer was shot and killed for failing to raise his hands after he thought the robbery was staged); *State v. Hill*, 44 Utah 79, 138 P. 1149, 1150 (Utah 1914) (used the term holdup to describe two persons who robbed a saloon with loaded revolvers and shot and killed a marshal who was present); *Herald-Republican Pub. Co. v. Lewis*, 42 Utah 188, 129 P. 624, 626 (Utah 1913) (confession of a defendant who entered a butcher shop with guns raised wherein a victim was shot, called the robbery a hold up); *State v. Riley*, 41 Utah 225, 126 P. 294, 296-97 (Utah 1911) (same incident as *Lewis* described as a hold up); *State v. Morgan*, 22 Utah 162, 61 P. 527, 528 (Utah 1900) (the two men who drew revolvers upon the victim, tied him up, robbed him of his person belongings and threatened to kill him were referred to by the Court as hold-ups). *See also Kelbach v. McCotter*, 872 P.2d 1033, 1034 (Utah 1994) (robber shot a victim in the head, turned to the bartender and said, "This is a stick-up."); *State v. Hickman*, 779 P.2d 670, (Utah 1989) (an incident where defendants who entered a home with sawed-off shotguns and shot a victim when he refused to empty his pockets was

by the cases cited by the State and the additional cases cited herein, every case in this jurisdiction discovered by either party, that mentions the term stickup or holdup, the robbery involved more than the use of the word stickup. In each case cited a weapon was actually produced, let alone mentioned or threatened. In this case there was no evidence of use, possession, or even threatened use of a dangerous weapon and therefore this conduct should not have resulted in a conviction for aggravated burglary. The cases associated with the term stickup are cases where the defendant used a weapon. Along with *Reyos* and *Ireland*, cases where even though no weapon was actually used there was an explicit or obvious threat to use a gun, the Utah cases dealing with armed robberies show that more evidence is required to prove aggravated robbery.

The trial court also committed plain error for exact same reasons when it failed to reduce Meza's conviction from aggravated robbery to simply robbery, following the verdict, because there was insufficient evidence to support a finding that Meza used or threatened to use a dangerous weapon in the course of a robbery. An error existed because, as argued above, Meza neither used nor threatened to use a dangerous weapon, he did not possess a facsimile of a dangerous weapon, nor did his conduct represent, explicitly or otherwise, that he had such a weapon, but most importantly, if the bulge in his pocket is enough evidence to support a finding that he possessed a representation of a

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referred to by to the court as a holdup); *State v. Hamilton*, 419 P.2d 770, 771 (Utah 1966) (defendant entered a market, took a gun from his pocket and said "This is a stick up" and demanded the money from the cash register); *State v.Brewer*, 158 P. 1094 (Utah 19196) (the Court referred to a man who entered a store with drawn revolvers and shot an employee who came into the store during the robbery as a hold up or highwayman).

dangerous weapon, there is not enough evidence, even viewed under the most favorable light, to find that the robber threatened to use that representation during the course of the robbery.

The only evidence about a weapon was that the robber's right hand was below the counter in his pocket where the witness testified she may have seen a gun shaped bulge, and that during the course of the robbery he gestured toward his hand. None of that evidence suggests that he used or threatened to use a dangerous weapon. As argued above, the State goes to great length to show that a gun is a dangerous weapon and that the use or threatened use a what is supposed to be a gun satisfies the statutes, but the State cannot show, either by reference to a similar case, or by logical argument, that the conduct complained of in this case constitutes use or threatened use. In contrast, the video evidence shows no bulge, and even if it were there, undetectable to the camera and only remembered by the victim at trial, the video clearly show that the robber did not use whatever, if anything, was in his pocket, nor did he threaten to use it.

As mentioned by the State, under plain error, an obvious evidentiary defect is one "in which the State presents *no* evidence to support an essential element of a criminal charge." *State v. Holgate*, 2000 UT 74, ¶ 17. There is no evidence of use or threatened use, period. Nothing about having his hand in his pocket on what may have been a gun, without more, constitutes use of a dangerous weapon. Nothing about having his hand in his pocket and gesturing to his hand, without more, constitutes the threat to use a dangerous weapon. The case law is clear on this point, this conduct is not what the

Courts of this state have deemed sufficient to justify conviction upon aggravated robbery and that fact should have been obvious to the trial court.

Because the plain language of the statutes defining aggravated robbery, and the cases applying those statutes, clearly demonstrated that the facts in this case do not support a guilty verdict on aggravated robbery the trial court committed plain error in both instances. The trial judge should have known that the evidence presented was insufficient to support a conviction for aggravated robbery when the case was presented to the jury. The error was harmful because the court's failure resulted in a conviction instead of a dismissal. The trial court should have known that the evidence presented was insufficient to support a conviction for aggravated robbery after the jury delivered its verdict. The error was harmful because Meza was convicted and sentenced on a first degree felony instead of a second degree felony.

## CONCLUSION AND PRECISE RELIEF SOUGHT

The State is incorrect when it likens the facts of this case to those in *Reyos* and *Ireland*. There is insufficient evidence to prove Meza possessed a dangerous weapon and no evidence whatsoever that he used or threatened to use such a weapon. For those reasons Meza asks this court to reverse the ruling of the trial court and grant his Motion for Directed Verdict acquitting Meza of aggravated robbery.

In the alternative, if the Court finds his Motion for Directed Verdict did not preserve the issue for appeal Meza asks this Court to apply the plain error standard of

review and to reduce the conviction from aggravated robbery to simple robbery, as a second degree felony, and remand to be resentenced.

Respectfully submitted this 7TH day of March, 2011.

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**CERTIFICATE OF MAILING**

I herby certify that I mailed a true and correct copy of the foregoing Appellant's Brief postage prepaid to the Utah State Attorney General, Appeals Division, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114 on the 7TH day of March, 2011.